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Dato' Seri Anwar bin Ibrahim v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPLICATION NO 05–47–03 OF 2014(W)
ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, ABU SAMAH NORDIN AND ZAHARAH IBRAHIM FCJJ
C 23 MAY 2016

Criminal Procedure — Jurisdiction of court — Federal Court — Inherent jurisdiction — Applicant's application for admission of additional evidence at hearing of review application — Whether application fell within any of exceptional circumstances to justify exercise of court's inherent jurisdiction under r 137 of the Rules of the Federal Court 1995 — Whether s 93 of the Courts of Judicature Act 1964 could be invoked with regard to application under r 137 — Whether jurisdictions in relation to appeals and reviews were same — Whether failure of justice would result if additional evidence not admitted — Whether abuse of court process to bring additional evidence under a review application — Whether additional evidence that applicant sought to be admitted met threshold requirements set out in R v Parks — Whether additional evidence unavailable in earlier trial proceedings — Whether additional evidence disclosed any evidence to applicant's defence of political conspiracy — Whether evidence credible — Whether evidence could cast reasonable doubt in judges as to guilt of applicant

Evidence — Credibility — Hearsay — Whether applicant's affidavit attempted to establish truth of contents of witness statement without maker being examined

The High Court had acquitted and discharged the applicant for the offence of sodomy punishable under s 377B of the Penal Code. However, on appeal the Court of Appeal had reversed the decision of the High Court. Subsequently, on 10 February 2015, this court had dismissed the applicant's appeal against the decision of the Court of Appeal. The applicant has now applied for a review of the decision taken by this court. By way of this present application the applicant sought to introduce the oral testimony of one Dato' Ramli bin Yusuff ('Dato' Ramli'), the Deputy Director of the CID at the material time, to be used as evidence at the hearing of his review application, pursuant to s 93 of the Courts of the Judicature Act 1964 ('the CJA'). In his oral testimony Dato' Ramli had referred to an incident wherein the applicant had suffered a black eye (the black eye incident) while he was in police custody as a result of being punched by the former Inspector General of Police Tan Sri Abdul Rahim Noor

and the alleged conspiracy by the former Attorney General Tan Sri Gani Patail and the former IGP Tan Sri Musa Hassan to stage a cover-up of the assault of the applicant. The applicant claimed that the oral testimony of Dato' Ramli was additional evidence that showed a pre-arranged plan similar to the black eye incident, which was consistent with an intention to frame the applicant and support his allegation of a political conspiracy. The applicant thus urged this court to exercise its inherent jurisdiction under r 137 of the Rules of the Federal Court 1995 ('the RFC') to review his case. The respondent opposed the applicant's application on the grounds that s 93 of the CJA 1964 could not be invoked in regard to an application for a review under r 137 of the RFC; and that the additional evidence that the applicant sought to be admitted did not meet the threshold requirement as specified by the relevant laws and under the principles laid out in the decided case authorities.

Held, dismissing the application:

(1) It is well settled law that r 137 of the RFC is a declaratory provision that should be strictly confined to procedural matters only and did not provide for a means of an appeal to the Federal Court against its own decision. Based on the decided case authorities it was clear that the applicant's application for admission of additional evidence did not fall within any of the exceptional circumstances to justify an exercise of this court's inherent jurisdiction under r 137. Based on the records of proceeding of the applicant's case the proceedings were all carried out in accordance with established legal principles. It was also noted that the applicant's case had undergone a full and lengthy trial and two-tier appeals at the Court of Appeal and the Federal Court (see paras 10–11).

(2) Further, the applicant's application was unsustainable as s 93 of the CJA was only designed for the inclusion of additional evidence in an appeal before this court and not with regard to an application for the exercise of the inherent power of the court to hear an application under r 137 of the RFC. The two jurisdictions — one in relation to appeals and the other in relation to reviews — could not be said to be one and the same but were legally distinct and different in their scope of application. The use of s 93 of the CJA by the applicant was therefore tantamount to an abuse of the court process since this application constituted an attempt to bring additional evidence under a review application (see paras 12–14).

(3) Even assuming that s 93 of the CJA 1964 could be invoked in regard to an application under r 137 of the RFC, the applicant had still to meet the next stage requirement of whether the additional evidence sought to be admitted satisfied the requirement as provided for under s 93 of the CJA and the requirements under the principles as set out in other decided case authorities. Under s 93 of the CJA, it had to be shown that it was 'necessary' to admit the additional evidence sought for by the applicant ie

that a failure of justice would result should the additional evidence not be admitted by the court. In the present case, the applicant had failed to satisfy the requirement of s 93 of the CJA. Based on the records of proceeding before the trial judge of the High Court and before the Court of Appeal and the Federal Court the applicant was given a fair trial and hearing. In effect there was an overwhelming amount of evidence available for the court to decide on the guilt or otherwise of the applicant and there was no necessity to resort to outside information. In the circumstances, there was no involvement of parties alleged to have conspired to fabricate the evidence as to what had allegedly taken place in the black eye incident (see paras 15–19).

(4) Further, in the interest of justice the attorney general had appointed a third party to carry out the appeal process in the applicant's case at the Court of Appeal and at the Federal Court due to the fact that the Attorney General Chambers of Malaysia was claimed to be biased towards the government and practised selective prosecution in framing the charge against the applicant (see para 20).

(5) As regards the admission of additional evidence the courts in Malaysia had adopted four common law four requirements, which had to be fulfilled cumulatively. These four principles as set out in the case of *R v Parks* [1961] 3 All ER 633 had not been complied with by the applicant. Firstly, the evidence that was sought to be admitted should have been unavailable at the trial or at the hearing of the applicant's appeal before the Court of Appeal and the Federal Court. However, the evidence showed that the applicant knew about the alleged conspiracy even before Dato' Ramli gave his oral testimony. This same evidence on fabrication of evidence was therefore available throughout the hearing of the appeal of the applicant's case at the Federal Court. In addition, there was no nexus between the testimony of Dato' Ramli and the defence of the applicant for his case. There was in fact nothing in the testimony of Dato' Ramli that would disclose any evidence in relation to the applicant's defence of political conspiracy. As such, the evidence of Dato' Ramli would be futile in supporting the applicant's allegation of political conspiracy which was altogether different in cause of action and relevancy. Even if the evidence was relevant to the applicant's case, it was only relevant to the applicant's previous case of sodomy (see paras 21–25).

(6) On the third requirement under the principles of *R v Parks* it was clear that the witness statement of Dato' Ramli was not credible evidence. This was because the applicant had failed to comply with the statutory requirement of r 76 of the RFC 1995 rendering the applicant's affidavit amounting to hearsay as it attempted to establish the truth of the contents of the witness statement without the maker, Dato' Ramli, being examined on the subject matter. In the present case the applicant had not

furnished the witness statement of Dato' Ramli in the form of an affidavit but as an exhibit to the applicant's own affidavit. Further, the witness statement of Dato' Ramli that allegedly incriminated Tan Sri Mohtar bin Abdullah and Tan Sri Abdul Gani Patail in the fabrication of evidence on the black eye incident was also hearsay evidence as the matter came to his knowledge through Tan Sri Musa Hassan (see paras 26–28).

(7) On the fourth requirement under the principle of *R v Parks*, it was clear that the evidence of Dato' Ramli sought to be adduced by the applicant was insignificant evidence in that such evidence could not cast a reasonable doubt in the mind of the judges as to the guilt of the applicant if that evidence had been given together with the other evidence at the trial. The order of acquittal and discharge of the applicant at the end of the defence case by the trial judge was not made on the ground of political conspiracy although the trial judge had considered the said defence. Hence, there were no merits to this application (see paras 29–30).

[Bahasa Malaysia summary

Mahkamah Tinggi telah melepas dan membebaskan pemohon kerana kesalahan sodomi yang boleh dihukum di bawah s 377B Kanun Keseksaan. Walau bagaimanapun, atas rayuan Mahkamah Rayuan telah mengakas keputusan Mahkamah Tinggi. Berikutan itu, pada 10 Februari 2015, mahkamah ini telah menolak rayuan perayu terhadap keputusan Mahkamah Rayuan. Pemohon sekarang memohon untuk semakan semula keputusan yang dibuat oleh mahkamah ini. Melalui permohonan ini pemohon memohon untuk memperkenalkan keterangan lisan Dato' Ramli bin Yusuff ('Dato' Ramli'), Timbalan Pengarah CID pada masa matan, untuk digunakan sebagai keterangan di perbicaraan permohonan semakan semulanya, menurut s 93 Akta Mahkamah Kehakiman 1964 ('AMK'). Dalam keterangan lisannya Dato' Ramli telah merujuk kepada satu kejadian di mana pemohon mengalami mata lebam (kejadian mata lebam) semasa dia berada dalam tahanan polis akibat ditumbuk oleh mantan Ketua Polis Negara Tan Sri Abdul Rahim Noor dan konspirasi yang dikatakan oleh mantan Peguam Negara Tan Sri Gani Patail dan mantan KPN Tan Sri Musa Hassan untuk mengadakan penutupan serangan pemohon. Pemohon mendakwa bahawa keterangan lisan Dato' Ramli adalah keterangan tambahan yang menunjukkan rancangan yang telah diatur terlebih dahulu sama seperti kejadian mata lebam itu, yang konsisten dengan niat untuk memerangkap pemohon dan menyokong dakwaannya tentang satu konspirasi politik. Pemohon dengan itu mendesak mahkamah ini untuk melaksanakan bidang kuasa sedia adanya di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP') untuk menyemak semula kesnya. Responden membantah permohonan pemohon atas alasan bahawa s 92 AMK tidak boleh digunakan berkenaan suatu permohonan bagi semakan semula di bawah k 137 KMP; dan bahawa keterangan tambahan yang dipohon perayu untuk diterima tidak memenuhi nilai ambang keperluan yang ditetapkan oleh

undang-undang berkaitan dan di bawah prinsip-prinsip yang dinyatakan dalam autoriti-autoriti kes yang telah diputuskan.

Diputuskan, menolak permohonan:

(1) Ia adalah undang-undang tetap bahawa k 137 KMP adalah peruntukan deklarasi yang patut terhad kepada perkara-perkara prosedural sahaja dan tidak diperuntukkan bagi maksud suatu rayuan kepada Mahkamah Persekutuan terhadap keputusannya sendiri. Berdasarkan autoriti-autoriti kes yang telah diputuskan ia adalah jelas bahawa permohonan pemohon untuk penerimaan keterangan tambahan tidak terjatuh di bawah mana-mana keadaan yang luar biasa untuk mewajarkan pelaksanaan bidang kuasa sedia mahkamah ini di bawah k 137. Berdasarkan rekod prosiding berhubung kes pemohon kesemua prosiding telah dilaksanakan menurut prinsip-prinsip undang-undang yang tetap. Ia juga dinyatakan bahawa kes pemohon telah menjalani perbicaraan penuh dan panjang dan rayuan dua tingkat di Mahkamah Rayuan dan Mahkamah Persekutuan (lihat perengan 10–11).

(2) Selanjutnya, permohonan perayu tidak boleh dikekalkan kerana s 93 AMK hanya direka bentuk untuk kemasukan keterangan tambahan dalam suatu rayuan di hadapan mahkamah ini dan bukan berkenaan permohonan untuk melaksanakan kuasa sedia ada mahkamah bagi mendengar permohonan di bawah k 137 KMP. Dua bidang kuasa — satu berkaitan rayuan-rayuan dan yang lain berkaitan semakan semula — tidak boleh dikatakan suatu yang satu dan sama tetapi dari segi undang-undang berbeza dan berbeza dalam skop pemakaiannya. Penggunaan s 93 AMK oleh pemohon sama seperti penyalahgunaan proses mahkamah kerana permohonan ini membentuk percubaan untuk memasukkan keterangan tambahan di bawah permohonan semakan semula (lihat perenggan 12–14).

(3) Walaupun dengan mengandaikan bahawa s 93 AMK boleh digunakan berkenaan permohonan di bawah k 137 KMP, pemohon masih perlu memenuhi keperluan peringkat seterusnya tentang sama ada keterangan tambahan yang dipohon untuk diterima telah memenuhi keperluan seperti yang diperuntukkan di bawah s 93 AMK dan keperluan di bawah prinsip yang dinyatakan dalam autoriti-autoriti kes lain yang telah diputuskan. Di bawah s 93 AMK, ia perlu dibuktikan bahawa ia adalah 'necessary' untuk menerima keterangan tambahan yang dipohon oleh pemohon iaitu bahawa kegagalan keadilan akan berlaku jika keterangan tambahan itu tidak diterima oleh mahkamah. Dalam kes ini, pemohon telah gagal memenuhi keperluan s 93 AMK. Berdasarkan rekod prosiding di hadapan hakim perbicaraan Mahkamah Tinggi dan di hadapan Mahkamah Rayuan dan Mahkamah Persekutuan pemohon telah diberikan perbicaraan yang adil dan didengar. Oleh demikian

terdapat jumlah keterangan sedia ada yang banyak bagi mahkamah memutuskan tentang kebersalahan perayu atau sebaliknya dan tiada keperluan untuk mengambil maklumat luar. Dalam keadaan itu, tiada penglibatan pihak-pihak yang dikatakan dalam konspirasi untuk memalsukan keterangan tentang apa yang dikatakan berlaku dalam kejadian mata lebam itu (lihat perenggan 15–19).

(4) Selanjutnya, demi kepentingan keadilan peguam negara telah melantik pihak ketiga untuk menjalankan proses rayuan dalam kes pemohon di Mahkamah Rayuan dan di Mahkamah Persekutuan berdasarkan fakta bahawa Jabatan Peguam Negara Malaysia didakwa berat sebelah terhadap kerajaan dan mengamalkan pendakwaan pilihan dalam membuat pertuduhan terhadap pemohon (lihat perenggan 20).

(5) Berhubung penerimaan keterangan tambahan mahkamah di Malaysia telah mengguna pakai empat keperluan common law, yang telah dipenuhi secara kumulatif. Keempat-empat prinsip tersebut sepertimana dinyatakan dalam kes *R v Parks* [1961] All ER 633 tidak dipatuhi oleh pemohon. Pertama, keterangan yang dipohon untuk diterima sepatutnya tidak tersedia semasa perbicaraan rayuan pemohon di hadapan Mahkamah Rayuan dan Mahkamah Persekutuan. Walau bagaimanapun, keterangan menunjukkan bahawa pemohon mengetahui tentang konspirasi yang dikatakan itu malah sebelum Dato' Ramli memberikan keterangan lisannya. Keterangan sama ini tentang pemalsuan keterangan oleh itu tersedia sepanjang perbicaraan rayuan kes pemohon di Mahkamah Persekutuan. Tambahan pula, tiada kaitan antara keterangan Dato' Ramli dan pembelaan pemohon bagi kesnya. Bahkan tiada apa-apa dalam keterangan Dato' Ramli yang menunjukkan apa-apa keterangan berkaitan pembelaan pemohon tentang konspirasi politik. Oleh itu, keterangan Dato' Ramli adalah sia-sia dalam menyokong dakwaan pemohon tentang konspirasi politik yang sama sekali berbeza dalam kausa tindakan dan kerelevanan. Walaupun keterangan itu relevan kepada kes pemohon, ia hanya relevan kepada kes sodomi terdahulu pemohon (lihat perenggan 21–25).

(6) Berhubung keperluan ketiga di bawah prinsip *R v Parks* ia adalah jelas bahawa kenyataan saksi Dato' Ramli bukan keterangan yang boleh dipercayai. Ini adalah kerana pemohon telah gagal mematuhi keperluan statutori k 76 KMP menyebabkan afidavit pemohon menjadi dengar cakap kerana ia cuba membuktikan kebenaran kandungan kenyataan saksi tanpa pembuat, Dato' Ramli, diperiksa tentang hal perkara itu. Dalam kes ini pemohon tidak mengemukakan kenyataan saksi Dato' Ramli dalam bentuk afidavit tetapi sebagai ekshibit kepada afidavit pemohon sendiri. Selanjutnya, kenyataan saksi Dato' Ramli yang dikatakan menunjukkan kebersalahan Tan Sri Mohtar bin Abdullah dan Tan Sri Abdul Gani Patail dalam pemalsuan keterangan tentang kejadian

mata lebam itu juga keterangan berat kerana perkara itu diketahuinya melalui Tan Sri Musa Hassan (lihat perenggan 26–28).

(7) Berhubung keperluan keempat di bawah prinsip *R v Parks*, ia adalah jelas bahawa keterangan Dato' Ramli dipohon untuk dikemukakan oleh pemohon adalah keterangan yang tidak penting kerana keterangan sebegitu tidak boleh menimbulkan keraguan munasabah dalam minda hakim-hakim tentang kebersalahan pemohon jika keterangan tersebut telah diberikan bersama dengan keterangan lain semasa perbicaraan. Perintah pelepasan dan pembebasan pemohon di akhir kes pembelaan oleh hakim perbicaraan tidak dibuat atas alasan konspirasi politik meskipun hakim perbicaraan telah mempertimbangkan pembelaan tersebut. Justeru, tiada merit dalam permohonan ini (lihat perenggan 29–30).]

Notes

For cases on credibility in general, see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 1363–1410.

For cases on Federal Court jurisdiction, see 5(2) *Mallal's Digest* (5th Ed, 2015) paras 2749–2758.

Cases referred to

Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLJ 137, FC (refd)

Che Din bin Ahmad v PP [1976] 1 MLJ 289 (refd)

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1; [2001] 4 CLJ 61, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP [2011] 1 MLJ 158, FC (refd)

Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications [2012] 2 MLJ 149, FC (refd)

Khamis v PP [1971] 2 MLJ 267 (refd)

Ladd v Marshall [1954] 3 All ER 745, CA (refd)

Murugayah v PP [2004] 2 MLJ 545, CA (refd)

R v Parks [1961] 3 All ER 633, CA (refd)

Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753, FC (refd)

Peruri Sooryaprakasam v PI Muniswami Chetti AIR 1925 Mad 42, HC (refd)

Sri Nath Shaha v Ralli (1905) 10 CWN 253 (refd)

Subramaniam v PP [1956] 1 MLJ 220, PC (refd)

Zahira Habibullah Sheikh & Anr vs State Of Gujarat & Ors (2004) 4 SCC 158, SC (refd)

Legislation referred to

Civil Procedure Code 1908 [Ind] s 151

Courts of the Judicature Act 1964 s 93, 93(1)

Criminal Procedure Code ss 317(1), 376(3), 379
Criminal Procedure Code [Ind] s 391
Evidence Act 1950 s 14
Federal Constitution art 145(3)
Penal Code s 377B
Rules of the Federal Court 1995 rr 76, 137

Gopal Sri Ram (Sivarasa Rasiah, CK Lim, Latheefa Koya, Shahid Adli and David Yii with him) (Karpal Singh & Co) for the appellant.
Mohamad Hanafiah bin Zakaria (Suhaidariah bt Ahmad with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zulkefli CJ (Malaya):

PRELIMINARY

[1] This is an application by the applicant, Dato' Seri Anwar Ibrahim, by way of motion for the oral testimony of Dato' Ramli bin Yusuff ('Dato' Ramli') to be taken by this court pursuant to s 93 of the Courts of the Judicature Act 1964 ('the CJA 1964'). The oral testimony of Dato' Ramli is sought to be used as evidence at the hearing of his application dated 30 April 2015 for the exercise of inherent jurisdiction by this court under r 137 of the Rules of the Federal Court 1995 ('the RFC 1995') to review his case. This court had earlier dismissed on 10 February 2015 the applicant's appeal against the decision of the Court of Appeal in allowing the appeal by the public prosecutor against the decision of the High Court in acquitting and discharging the applicant for the offence of sodomy punishable under s 377B of the Penal Code.

[2] In the affidavit in support of his application the applicant exhibited the witness statement ('exh AE1') given by Dato' Ramli as part of Dato' Ramli's sworn testimony in the case of Kuala Lumpur High Court Civil Suit No S-221–249 of 2009 ('the civil suit'). The factual circumstances as narrated in the witness statement of Dato' Ramli in the said civil suit are in relation to the so-called 'black-eye' incident wherein the applicant had suffered injury in his eye as a result of being punched by the former Inspector General of Police Tan Sri Abdul Rahim Noor and the alleged conspiracy by the former Attorney General Tan Sri Gani Patail and the former IGP Tan Sri Musa Hassan to stage a cover-up of the incident.

[3] We reproduce herein the relevant paras 18–23 of the witness statement of Dato' Ramli relating to the 'black-eye' incident as follows:

18. Q. What was the 'Black Eye' incident about?

A. When Dato' Seri Anwar Ibrahim was initially detained in 1998, the

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situation was very tense. When Dato' Seri Anwar Ibrahim was produced in Court after his detention, he had a black eye. There was widespread public outrage at what had happened which led to the forming of a Royal Commission of Inquiry to ascertain who had caused Anwar Ibrahim's black eye.

B

19. Q. How were you involved in the 'Black Eye' incident?

A. I was the main witness of the 'Black Eye' incident which took place on 20.9.1998 and I was the one who pulled Tan Sri Rahim Noor out of Dato' Seri Anwar Ibrahim's cell with the help of the former Director of CID, Dato' Yaacob Mohd Amin. I was then asked by Tan Sri Musa Hassan who was the then Deputy Director of CID (Legal and Prosecution) to fabricate evidence.

C

20. Q. How did he ask you to fabricate evidence?

D

A. A few days after the incident, Tan Sri Musa Hassan came to see me. He informed me that he was sent by the late AG Tan Sri Mohtar Abdullah and Tan Sri Gani Patail. He asked me to lodge a police report against Dato' Seri Anwar Ibrahim to say that he, Dato' Seri Anwar Ibrahim had lodged a false report against Tan Sri Rahim Noor and to arrange for a doctor to give an expert report that Dato' Seri Anwar Ibrahim had inflicted the injuries on himself. This 'expert report' was needed to show that Dato' Seri Anwar Ibrahim's injuries were not caused by any assault and to counter and/or neutralise other reports made by various doctors.

E

F

21. Q. How did you respond to Tan Sri Musa Hassan?

A. I refused to do it. I told him off and gave him a piece of my mind. I also told him that he and Tan Sri Gani Patail were both at the 30th floor of Bukit Aman on the night of 20.9.1998 and were clearly aware that Dato' Seri Anwar Ibrahim was assaulted. Because of the position that I took, I was seen as disloyal by Tan Sri Musa Hassan and Tan Sri Gani Patail.

G

22. Q. Did you tell anyone about this?

H

A. I warned the IO of the case, Dato' Mat Zain, to be careful of Tan Sri Musa Hassan because he was planning to fabricate evidence. A few days later, Tan Sri Norian Mai, the then Deputy IGP called me up and told me not to fabricate evidence and to leave it to Dato' Mat Zain to handle the investigation. I only came to know later on during the RCI hearing that Tan Sri Gani Patail and Tan Sri Musa Hassan went ahead to tender 3 fabricated medical reports prepared by Dr Abdul Rahman Yusuff.

I

23. Q. What do you mean when you say that because of the position you took you were seen as disloyal?

A. At the time, I was the Deputy Director of CID. Rightfully, Tan Sri Musa should be reporting to me on the investigations. However, he by-passed police protocols and chose to confer directly with Tan Sri Gani Patail who was then the senior DPP leading the prosecution together with Dato' Azahar bin Mohamed, Dato' Yusof Zainal Abidin, Dato' Nordin Hasan and Tuan Shamsul Sulaiman. At that time there were allegations being made about the authenticity of the evidence in the sodomy trial and I was asked to support Tan Sri Musa Hassan and Tan Sri Gani Patail's version of events. I did not do so. I even cautioned Tan Sri Musa Hassan about his conduct and he was not too happy about it and accused me of circumventing the investigations.

SUBMISSION OF THE APPLICANT

[4] Learned counsel for the applicant, Gopal Sri Ram, conceded that there is no specific provision in the CJA 1964 or in the RFC 1995 dealing with the adducing of further evidence at the hearing of a review application. The only provision for the adducing of additional evidence is s 93(1) of the CJA 1964 which applies to appeals and not to review.

[5] However, for the applicant it was contended that it is still open to the Federal Court to invoke its inherent power under r 137 to permit the further evidence. On our r 137 there is an equivalent provision in s 151 of the Civil Procedure Code 1908 [Ind] for reference. The position taken by learned counsel is that this provision may be invoked to do justice provided that there is no prohibition in the written law or in the rules and there is no specific provision covering the same topic (see the case of *Peruri Sooryaprakasam v PI Muniswami Chetti* AIR 1925 Mad 42).

[6] The point of contention for the applicant is that in this case the Federal Court in its written judgment at para 205 in dismissing the applicant's appeal held that the allegation of a political conspiracy remained unsubstantiated by any credible evidence. The additional evidence the applicant now seeks admission of relates to similar fact evidence to show a system that is consistent with an intention to frame the applicant. This is relevant evidence under s 14 of the Evidence Act 1950 and may therefore be relied upon by the applicant to bring home his case (see the case of *Sri Nath Shaha v Ralli* (1905) 10 CWN 253 at pp 254–255).

[7] It was also submitted for the applicant that this being a criminal case and in particular falling within r 137, the case of *Ladd v Marshall* [1954] 3 All ER 745 conditions do not apply. Even if this had been an application made in the appeal proper, it is only of necessity that this is a governing factor. It was impressed upon us that in interpreting the similarly worded s 317(1) of our

Criminal Procedure Code ('the CPC') and s 391 of the Criminal Procedure Code [Ind], courts should hold that the discretion is to be exercised in the interests of justice (see the case of *Zahira Habibullah Sheikh & Anr vs State of Gujarat & Ors* (2004) 4 SCC 158 at p 179).

[8] Learned counsel for the applicant further contended that in our present case the evidence of Dato' Ramli sought to be adduced shows a pre-arranged plan similar to the 'black eye' incident to frame the applicant. The conduct in the earlier case may be used to show an intention to injure the applicant. At this stage the court is only concerned with the admissibility of the evidence and not its weight. The probative value that is to be attached to the additional evidence is a factor that only arises when considering the evidence in the context of the application to review.

SUBMISSION OF THE RESPONDENT

[9] The respondent opposed the applicant's application essentially on two main issues. Firstly, it is the contention of the respondent that s 93 of the CJA 1964 can not be invoked in regard to an application for a review under r 137 of the RFC 1995. Secondly, the additional evidence that is sought to be admitted does not meet the threshold requirement as specified by the relevant laws and under the principle laid out in the decided case authorities.

DECISION

[10] We shall first deal with the first issue as to whether s 93 of the CJA 1964 can be invoked with regard to an application under r 137 of the RFC 1995. It is our considered view that the scope and application of r 137 of the RFC 1995 is well settled. Rule 137 is a declaratory provision that must be strictly confined to procedural matters only. Rule 137 gives the Federal Court the limited 'inherent power' or 'inherent jurisdiction' to hear any application or to make any order to prevent injustice or to prevent an abuse of the court process. It does not confer upon the Federal Court a statutory jurisdiction or a new jurisdiction to hear any application to review its own decision. It does not provide for a means of an appeal to the Federal Court against its own decision (see the cases of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 and *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753).

[11] We are also of the view that r 137 when applied should not be exercised liberally but sparingly. It is only applicable to very exceptional cases where significant injustice had occurred. It is to remedy any injustice arising from procedural unfairness due to circumstances such as coram failure, infringement and wrong application of statutory laws; decision obtained by fraud or

suppression of evidence; breach of the rule of natural justice or that the decision was tainted by actual bias or a real danger of bias on the part of one or more members of the panel hearing the case (see the cases of *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137 and *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61). Based on these decided case authorities it is our finding that the applicant's application for admission of additional evidence does not fall within any of the exceptional circumstances to justify us to exercise our inherent jurisdiction under the said r 137. It can be examined and concluded from the records of proceeding of the applicant's case that the proceedings were all carried out in accordance with established legal principles. It is to be noted here that the applicant's case had undergone a full and lengthy trial and two-tier appeals at the Court of Appeal and the Federal Court.

[12] Further, it is our judgment that the applicant's application is unsustainable as s 93 of the CJA 1964 is only designed for the inclusion of additional evidence in an appeal before this court and not with regard to an application for the exercise of the inherent power of the court to hear an application under r 137 of the RFC 1995. Section 93 of the CJA 1964 provides as follows:

> (1) In dealing with any appeal in a criminal case the Federal Court may, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the High Court.
>
> (2) When the additional evidence is taken by the High Court, it shall certify the evidence, with a statement of its opinion on the case considered with regard to the additional evidence to the Federal Court, and the Federal Court shall thereupon proceed to dispose of the appeal.
>
> (3) The parties to the appeal shall be present when additional evidence is taken.
>
> (4) In dealing with any appeal in a criminal case the Federal Court may also, if it thinks fit, call for and receive from the High Court a report of any matter connected with the trial.

[13] We agree with the submission of the learned DPP that the jurisdiction in relation to appeals are provided for separately from that over applications for the exercise of inherent jurisdiction under r 137 of the RFC 1995. The two jurisdictions — one in relation to appeals and the other in relation to reviews — cannot be said to be one and the same but are legally distinct and different in their scope of application. On this point the Federal Court in the case of *Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications* [2012] 2 MLJ 149, at p 162 had this to say:

> a review application under rule 137 of the Rules should not be equated with an appeal process

[14] We are of the view that the procedure for admission of additional evidence under s 93 of the CJA 1964 is only applicable specifically under the jurisdiction of the appellate court by means of rehearing but not through a reviewing process. The use of s 93 of the CJA 1964 by the applicant is therefore tantamount to an abuse of the court process since this application constitutes an attempt to bring additional evidence under a review application.

[15] Even assuming that s 93 of the CJA 1964 can be invoked in regard to an application under r 137 of the RFC 1995, the applicant has still to meet the next stage requirement of whether the additional evidence sought to be admitted satisfies the requirement as provided for under s 93 of the CJA 1995 and the requirements under the principles as set out in the case of *R v Parks* [1961] 3 All ER 633 and other decided case authorities.

[16] We shall now deal with this second issue as to whether the threshold requirement for admission of additional evidence in an appeal and in the context of the present case in a review application has been complied with.

[17] It is to be noted under s 93 of the CJA 1964, it must be shown that it is 'necessary' to admit the additional evidence sought for by the applicant. The applicant has to show that a failure of justice would result should the additional evidence not be admitted by the court. In the conduct of a criminal trial all the necessary evidence available must be produced during the trial stage of the case and not during the appeal stage. A trial cannot be by instalment. Admission of additional evidence at an appellate stage would only be resorted to when the court is of the opinion that such evidence is necessary for the justice of the case and not as a matter of practice. On this point in the case of *Khamis v Public Prosecutor* [1971] 2 MLJ 267 his lordship Sharma J, inter alia, explained that the words 'necessary' means that the additional evidence would be admitted if failure to admit it would result in a miscarriage of justice. Thus if the refusal to admit the additional evidence does not lead to a failure of justice, the additional evidence is not deemed necessary for the consideration of the court.

[18] It is our considered view that the applicant has failed to satisfy the requirement of s 93 of the CJA 1964. Based on the records of proceeding before the trial judge of the High Court and before the Court of Appeal and the Federal Court the applicant was given a fair trial and hearing. In fact at the conclusion of the trial the learned judge of the High Court had acquitted and discharged the applicant. There was an overwhelming amount of evidence available for the court to decide on the guilt or otherwise of the applicant. There is no necessity to resort to outside information.

[19] It is our finding that for the present case there was no involvement of parties alleged to have conspired to fabricate the evidence as to what had

allegedly taken place in the black eye incident. The respondent in the affidavit in reply to the applicant's application had categorically denied the involvement of Tan Sri Abdul Gani Patail (the former attorney general) and Tan Sri Musa Hassan (the former Inspector General of Police) in the fabrication of the evidence in the present case. It was stated that both Tan Sri Abdul Gani Patail and Tan Sri Musa Hassan had discharged themselves from playing a role in the investigation and in the prosecution of the applicant's case. It was further stated that in fact it was Tan Sri Idrus Harun (the former solicitor general) who gave the decision to prosecute and to appeal against the decision of the High Court in acquitting and discharging the applicant.

[20] It was further submitted for the respondent that in the interest of justice the attorney general had appointed a third party to carry out the appeal process in the applicant's case at the Court of Appeal and at the Federal Court due to the fact that the Attorney General Chambers of Malaysia was claimed to be biased towards the government and practised selective prosecution in framing the charge against the applicant. In doing so Tan Sri Muhammad Shafee Abdullah was duly appointed under ss 376(3) and 379 of the CPC read together with art 145(3) of the Federal Constitution to conduct and lead the prosecution team at the hearing of the appeals at the Court of Appeal and the Federal Court. On the allegation of conflict of interest against Tan Sri Muhammad Shafee Abdullah on his appointment the Federal Court in their decision found Tan Sri Muhammad Shafee to be a fit and proper person to be appointed under s 376(3) of the CPC as no evidence was tendered by the applicant to prove that there was such a conflict of interest.

[21] We shall now deal with the issue as to whether the principles laid down in the case of *R v Parks* for admission of additional evidence have been complied with by the applicant. The English Court of Criminal Appeal in *R v Parks* decided to expand the jurisprudence and requirements as propounded in *Ladd v Marshall* for admission of additional evidence and ruled that four requirements need to be adhered to as follows:

> Firstly, the evidence that is sought to be called must be evidence which was not available at the trial.
>
> Secondly, it must be evidence relevant to the issues.
>
> Thirdly, it must be evidence which is credible in the sense that it is well capable of belief.
>
> Fourthly, the Court will after considering the evidence go on to consider whether there might have been reasonable doubt in the minds of the Jury as to the guilt of the accused person if that evidence had been given together with the other evidence at the trial.

[22] As regards the position in Malaysia on the admission of additional evidence the common law principle was adopted into our local jurisdiction wherein our courts have held that the said four requirements have to be fulfilled cumulatively (see the cases of *Murugayah v Public Prosecutor* [2004] 2 MLJ 545 and *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289).

[23] We are of the view that the applicant had failed to comply with the pre-requisites in *R v Parks* that the evidence that is sought to be admitted was not available at the trial or at the hearing of the applicant's appeal before the Court of Appeal and the Federal Court. On this point we would refer to the statutory declaration ('SD') of a police officer, Dato' Mat Zain bin Ibrahim ('Dato' Mat Zain') affirmed on 7 October 2013 wherein had been highlighted the same allegation on the conspiracy to fabricate evidence in the black eye incident and the persons who had been involved in the said conspiracy. This SD of Dato' Mat Zain was exhibited by the applicant in his affidavit in support affirmed on 5 December 2013 to substantiate his case on the application to disqualify Tan Sri Muhammad Shafee Abdullah as lead counsel in the prosecution's appeal against the acquittal of the applicant by the High Court in the present case.

[24] It is our finding that the applicant by exhibiting this SD of Dato' Mat Zain showed that the applicant knew about the alleged conspiracy even before Dato' Ramli gave his testimony on May 27, 2015 in the said civil suit. This same evidence on fabrication of evidence was therefore available throughout the hearing of the appeal of the applicant's case at the Federal Court which ended on 7 November 2014.

[25] We are also of the view that the evidence of Dato' Ramli that the applicant applies to be taken by this court is irrelevant to the issues raised by the applicant. There is no nexus between the testimony of Dato' Ramli and the defence of the applicant for his case. We find nothing in the testimony of Dato' Ramli that would disclose any evidence in relation to the applicant's defence of political conspiracy. The evidence of Dato' Ramli would be futile in the circumstances of the case. Given that the case on the black eye incident and the conspiracy to fabricate the evidence on the incident had already been concluded, it would be too remote to admit the evidence on the present applicant's case to support his allegation of political conspiracy which is altogether different in cause of action and relevancy. Even if the evidence is relevant to the applicant's case, it is only relevant to the applicant's previous case of sodomy in 1988.

[26] On the third requirement under the principles of *R v Parks* we are of the view that the witness statement of Dato' Ramli used in the applicant's affidavit in support of his present application is not credible evidence. This is because

the applicant has failed to comply with the statutory requirement of r 76 of the RFC 1995 rendering the applicant's affidavit amounting to hearsay as it attempts to establish the truth of the contents of the witness statement without the maker, Dato' Ramli, being examined on the subject matter (see the case of *Subramaniam v Public Prosecution* [1956] 1 MLJ 220). Rule 76 of the RFC 1995 provides as follows:

> Upon any motion, petition, application, or summons evidence may be given by affidavit, but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence unless by the leave of the court or a judge.

[27] It must be stated here that r 76 of the RFC 1995 clearly requires evidence to be in the form of affidavit and the maker of such affidavit is subject to cross-examination for verification of his statement before it can be used as evidence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. In the present case the applicant has not furnished the witness statement of Dato' Ramli in the form of an affidavit but as an exhibit to the applicant's own affidavit.

[28] We also noted that the witness statement of Dato' Ramli that allegedly incriminates Tan Sri Mohtar bin Abdullah and Tan Sri Abdul Gani Patail in the fabrication of evidence on the black eye incident is also hearsay evidence as the matter came to his knowledge through Tan Sri Musa Hassan. In his statement he said that Tan Sri Musa Hassan came to see him to transmit the message that Tan Sri Mohtar Abdullah and Tan Sri Gani Patail had instructed him to lodge a police report against Dato' Seri Anwar Ibrahim to say that Dato' Seri Anwar Ibrahim had lodged a false report against Tan Sri Abdul Rahim Noor and to arrange for a doctor to give an expert report that Dato' Seri Anwar Ibrahim had inflicted the injuries on himself.

[29] On the fourth requirement under the principle of *R v Parks* we are of the view the evidence of Dato' Ramli sought to be adduced by the applicant is insignificant evidence. We do not think that such evidence might cast a reasonable doubt in the mind of the judges as to the guilt of the applicant if that evidence had been given together with the other evidence at the trial. The order of acquittal and discharge of the applicant at the end of the defence case by the trial judge was not made on the ground of political conspiracy although the trial judge did consider the said defence.

[30] For the abovestated reasons we find there is no merit in this application. We therefore dismiss the applicant's application.

Application dismissed.

Reported by Kohila Nesan